Supreme Court, U.S.
FILED

No. 01 5[illegible] SEP 19 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 2001

MELVIN LLOYD RICHARDS,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

DEBORAH A. SCHWARTZ
Attorney for Petitioner
41 Madison Avenue
New York, New York 10010
(212) 252-1323

SW
St. Louis West, Inc. (9696)
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper

24pp

QUESTIONS PRESENTED

Whether a determination under the Sentencing Guidelines that an amount of loss that more than doubles a defendant's sentence is a sentencing factor and not sin element of the offense to be established beyond a reasonable doubt is a violation of defendant's fifth amendment rights under the due process clause and the notice and jury trial guarantees of the sixth amendment as set forth by this Court in Apprendi v. New Jersey.

Whether the government's prior plea agreement should be enforced which would result in vacating the judgment of conviction and dismissal of the indictment, pursuant to the fifth amendment due process clause.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and United States Sentencing Commission	2
Guidelines Involved in the Case	2
Statement of the Case	3
Reasons for Granting The Writ	4
Conclusion	8
Appendix A	1a

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) 4, 5, 6

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 5

Jones v. United States, 526 U.S. 277 (1977) 5

United States v. Buckland, ___ F.3d ___, 2001 WL 893440 (9th Cir. 8/9/01) 6, 7

United States v. Ready, 82 F1.3d 551, 558 (2d Cir. 1995) ..... 7 - 8

Statutes

21 U.S.C. Section 841(b)(1)(A) and (B) 2

28 U.S.C. Section 1254(1) 2

U.S.S.G. 2F1.1 530 U.S. at 565 6

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit Court of Appeals were: Melvin Lloyd Richards, Petitioner here, the United States of America Respondent here, and co-appellants: Marc H. Hussey, Frank P. 2itkevitz and Blake W. Alexander, The Second Circuit Court off Appeals affirmed their convictions in the same opinion in which it affirmed Petitioner's conviction.

No.

In The

Supreme Court of the United States

October Term, 2001

MELVIN LLOYD RICHARDS,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

In The
SUPREME COURT OF THE UNITED STATES
MELVIN LLOYD RICHARDS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Melvin Lloyd Richards, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The Second Circuit Court of Appeals issued a summary order affirming the judgment of the United States District Court for the Southern District of New York which is reported at ___ F.3d ___, 2001 U.S. App. LEXIS 13807 (2d Cir. June 21, 2001). The summary order is reprinted in the Appendix herein (A. 1-5).

Jurisdiction

The summary order was entered June 21, 2001. It affirmed Petitioner's judgment of conviction and sentence. This Petition has been flied within 90 days of the date of the affirmance by the Second Circuit Court of Appeals. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional Provisions, Statutes and United States Sentencing Guidelines Involved in the Case

The Fifth Amendment to the United States Constitution provides in relevant part that:

> "No person shall be.... deprived of life, liberty or property, without due process of law.... "

The Sixth Amendment to the United States Constitution provides in relevant part that:

> "In all criminal prosecutions, the accused shall enjoy the right.... to be informed of the nature and cause of the accusation.... against him.... and to have the Assistance of Counsel for his defense:" The provisions of the United States Sentencing Guidelines ("USSG") Section 2F1.1 provide in relevant part that the sentence of the defendant is calculated based on a base offense level of 6 and enhancements of that level based on a determination of an amount of loss made by

the court under a preponderance of the evidence standard.

Statement of the Case

Prior to his indictment in this case, on February 14, 1997, the Petitioner Melvin Lloyd Richards had pleaded guilty to tax evasion in the Southern District of California pursuant to a plea agreement which provided that the government, "is not aware of any other jurisdiction that is contemplating bringing criminal charges against the defendant for criminal acts committed by him." He was sentenced to twenty-seven months in prison on December 2, 1997. During this time, the government became aware of the conduct which was subsequently charged in the instant indictment. Nevertheless, the government did not reveal the existence of this investigation at sentence. During pretrial proceedings, the Petitioner moved to dismiss the instant indictment on the ground that it had been covered by his prior plea in the Southern District of California. That motion was denied and the Second Circuit denied his appeal on the same ground.

The Petitioner was convicted, after a jury trial, of conspiring to commit securities fraud in connection with the acquisition of controlling interest in the stock of United Media Group, Inc. ("UMGI") which was to be divided among the conspirators, manipulated through market makers to the inflated price of $5.00 a share, and then sold by the conspirators at a profit. Richards acted as a consultant who assisted small companies in obtaining listings as public companies by brokering the sale of publicly, traded shell corporations. The government's principal evidence against Richards was elicited from a convicted, cooperating co-conspirator, Ron Gray, who had worked as an unlicensed

stockbroker, and who was a perjurer, admitted forger and drug user and dealer.

Following Petitioner's conviction, the United States Probation Office prepared a Pre-Sentence Report ("PSR,,) in response to which detailed objections were made. On August 24, 2000, Petitioner was sentenced to eighty-seven months in prison after the District Court denied his motion to preclude the government, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), from offering proof of the amount of loss that would increase the offense level 11 points although the evidence concerning the amount of loss had not been charged in the indictment, nor found by the jury beyond a reasonable doubt. During a sentencing hearing concerning the amount of loss attributable to Petitioner's conduct, the government and Petitioner stipulated to an agreed amount of loss that added 10 levels to his base offense level of 6. However, the stipulation permitted Petitioner to challenge the application of the enhanced loss amount to him in the absence of a jury finding as to any loss amount.

REASONS FOR GRANTING THE WRIT

There are compelling reasons for this Court to issue a Writ of Certiorari in this case. This case directly presents the issue to this Court to determine whether, under the Sentencing Guidelines, an amount of loss that more than doubles a sentence is a sentencing factor that can be imposed by a judge or an element of the offense to be established beyond a reasonable doubt. If such an amount of loss is an element of the offense then in this case its' imposition was a violation of the defendant's fifth amendment rights under the due process clause and notice and jury trial guarantees of the sixth amendment as set forth by this Court in Apprendi v. New Jersey. This issue is ripe for resolution by this Court because

of the volume of litigation that has after miter Apprendi in interpreting amount of lose in the context of fraud "cases where the enhancement substantially affects the sentence but does not result in a sentence in excess of the statutory maximum. This Court should extend the Apprendi principle, as suggested in Justice Thomas' dissent, to fraud loss calculations which disproportionately enhance a defendant's sentence under the fifth and sixth amendment protections.

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court addressed the issue of sentencing factor as distinguished from element of the offense and found that at some level of enhancement the constitutional guarantees of the fifth and sixth amendments would be implicated. Almendarez-Toress was followed by Jones v. United States, 526 U.S. 227 (1999), which enunciated the principle that under the due process clause and the notice and jury trial guarantees of the sixth amendment, any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

In Apprendi v. New Jersey,. 530 U.S. 466 (2000), this Court determined that the New Jersey statutory scheme in effect created and defined a series of new crimes, the elements of which were the elements of the applicable second-degree crime plus an intention to intimidate because of bias toward the victim. The new crimes carried statutory sentences potentially twice as long as those sentences for the second-degree crimes. In a 5-4 decision, this Court held that the enhancement statute could only be applied if the indictment specifically charged bias and the jury determined that the defendant acted with, the required intent beyond a reasonable doubt. As Justice Thomas made clear in analogizing the New Jersey statute to grand larceny as the

aggravated form of larceny, where the punishment for the crime is based on some fact that is proportional to the value of the stolen goods, that fact is an element of the offense. As Justice O'Connor noted in Apprendi, the principle would apply to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations including the Sentencing Guidelines loss calculation as set forth in USSG 2F1.1. 530 U.S. at 565. Under that reasoning, a defendant would be entitled to have a jury decide beyond a reasonable doubt, every fact relevant to the determination of a sentence.

In United States v. Buckland, __F.3d__, 2001 WL 893440 (9th Cir. 8/9/01), the Ninth Circuit held that the provisions of 21 U.S.C. Section 841(b)(1)(A) and (B) are unconstitutional on their face under Apprendi. Buckland was convicted on several drug charges for his role in distributing methamphetamine and he was sentenced to 324 months in prison after the district court found that he was responsible for eight kilograms of methamphetamine. Buckland's sentence was vacated and remanded for resentencing under the provisions of 21 U.S.C. Section 841(b)(l)(C) which limits the new sentence to a 20 year maximum. According to the Ninth Circuit, the "relevant inquiry" is the effect rather than the form of the factor-"does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." The Court reasoned that Subsections 841(b)(1)(A) and (B) permit the judge to find a fact, the quantity of drugs, that increases the maximum sentence beyond the 20 year maximum in Section 841(b)(l)(C) that may be imposed for an unspecified amount of drugs. They, therefore, remove the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum sentence he would receive if punished according to the facts reflected in the jury verdict

alone. The district court's finding that Buckland was responsible for 8 kilograms of methamphetamine increased his potential maximum sentence from 20 years, based on the jury finding of an unspecified amount of methamphetamine, to life imprisonment. This differential was of constitutional significance and under the relevant inquiry test set forth in Apprendi, the Court felt constrained to conclude that 841(b) is unconstitutional.

Most significantly, the Ninth Circuit explicitly rejected as unworkable a "middle road" by which drug quantity is sometimes an element of the offense to be proved to a jury beyond a reasonable doubt and sometimes a sentencing factor that the judge can decide by a preponderance of the evidence depending on whether the resulting sentence would be beyond the statutory maximum. As a practical matter, the Court stated, quantity will always have to be submitted to the jury, and if not, the sentence must be capped at 20 years based on, Section 841(b)(1)(C).

Under Buckland, since the Richards was exposed to a sentence which was far greater then that authorized by the jury's verdict, this Court must grant certiorari to vacate Petitioner's sentence. In doing so, this Court can take the opportunity presented by this case to elucidate the distinction between "element of the offense" and "sentencing factor" as well as addressing the constitutional implications inherent in that categorization. This case presents the appropriate circumstance under which to address these issues.

A second reason to grant this Writ is to enforce the government's 1997 agreement in accordance ice with well-settled legal principles of due process that interpret pleas in accordance with principles of contract and in light of due process concerns for fairness. United States v. Ready, 82 F.3d

551, 558 (2d Cir. 1996). On February 14, 1997, Petitioner pleaded guilty to a single count information which charged him with tax evasion. In the written plea agreement, the government made a representation that it was not aware of any other jurisdiction which contemplated the bringing of criminal charges against him. This was a material inducement to Petitioner in entering into the plea.

On December 2, 1997, Petitioner was sentenced to 27 months in prison. Daring the period between the entry of the plea and the sentencing, the conduct charged in the instant case occurred. The government through an informant outside New York was aware of the conduct. Yet, it never brought that fact to the attention of the court prior to sentence and permitted Petitioner to be sentenced based on its omission. The government should not have been mute and taken advantage of Petitioner in that manner. Without that closure, Petitioner did not get what he bargained for in his plea. Remand is warranted after grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Deborah A. Schwartz
Attorney for Petitioner
Melvin Lloyd Richards

No.

In The

Supreme Court of the United States

October Term, 2001

MELVIN LLOYD RICHARDS,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

APPENDIX

TABLE OF CONTENTS
TO APPENDIX

Page

Appendix A – Order and Judgment of the United States Court of Appeals for the Second Circuit 1a

SDNY-nyny
98-cr-1377
Chin

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of June, two thousand one.

PRESENT:

JOSÉ A. CABRANES,
CHESTER J. STRAUB,
ROBERT D. SACK,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v. No. 00-1528 (L),
00-1606, 00-1614, 00-1625

MARC W. HUSSEY, BLAKE W. ALEXANDER, MELVIN LLOYD RICHARDS, FRANK P. ZITKEVITZ,
Defendants Appellants,

LAURENCE T. ZITKEVITZ, AGUNLOYE OLAWANDE, aka WANDE, ALEX SHEYFER, ALEXANDER ZALMENENKO,
Defendants.

APPEARING FOR APPELLANTS:

ANTHONY RANDAZZ (Miles Feinstein, *on the brief*), Clifton, NJ, for *Appellant Marc W. Hussey*

ROBERT J. KRAKOW, New York, NY, *for Appellant Blake W. Alexander*

DEBORAH A. SCHWARTZ, New York, NY, *for Appellant Melvin Lloyd Richards*

JAMES M. BRANDEN (Valerie S. Amsterdam, *on the brief*), Amsterdam & Branden, New York, NY, *for Appellant Frank P. Zitkevitz*

APPEARING FOR APPELLEE:

NANCY KESTENBAUM, Assistant United States Attorney (Joanna C. Hendon, Gary Stein, Assistant United States Attorneys, *of counsel*; Mary Jo White, United States

Attorney, *on the brief),* United States Attorney's Office for the Southern District of New York, New York, NY

Appeal from judgments of the United States District Court for the Southern District of New York (Denny Chin, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of said District Court be and are **AFFIRMED.**

Appellants Marc Hussey, Blake Alexander, Melvin Richards, and Frank Zitkevitz appeal from judgments of conviction and sentence entered against them in the District Court. Each appellant was convicted of conspiring to commit securities fraud, in violation of 18 U.S.C. § 371, and engaging in securities fraud, in violation of 15 U.S.C. § 78; in addition, Richards and Zitkevitz were convicted of engaging in wire fraud, in violation of 18 U.S.C. § 1343.

Hussey challenges his conviction and sentence on twelve grounds, arguing principally that (1) the District Court erred in declining to provide the jury with a change of multiple conspiracies; (2) there was insufficient evidence presented at trial to support all of his counts of conviction; (3) the jury's verdict of conviction on one count was inconsistent with its verdict of acquittal on another count; (4) the Government's rebuttal summation was improper; (5) the District Court erred in declining to give the jury a missing witness instruction; (6) the District Court erred in admitting evidence concerning his sale of Nichi Capital securities; (7) the District Court erred in determining that a check admitted into evidence had been authenticated; (8) the District Court erred in not excusing three jurors for cause; (9) he was denied

his Sixth Amendment right to conflict-free counsel; (10) the District Court violated the teachings of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by determining the amount of loss attributable to his fraud by a standard of preponderance of the evidence; (11) the District Court erred in imposing a two-level enhancement under the Sentencing Guidelines for abuse of trust and a two-level enhancement for obstruction of justice; and (12) the disparity between his sentence and those of Alexander and Zitkevitz violated his right to equal protection and due process under the U.S. Constitution.

Alexander and Richards raise some of these same arguments to challenge their convictions and sentences. In addition, Richards argues that the District Court should have dismissed the charges against him because of a February 1997 plea agreement in the Southern District of California, and erred in declining to depart downward from the Sentencing Guidelines on the erroneous assumption that it was not entitled to do so.

multiple-conspiracies charge at trial. We find no merit in this argument.

To secure a reversal on the ground that the district court failed to give a charge of multiple conspiracies, a defendant must show that (1) there was evidence of separate networks operating independently of each other and (2) he suffered substantial prejudice resulting from the failure to give the requested charge. See *United States v. Cusimano*, 123 F.3d 83, 89 (2d Cir. 1997); *United States v. Maldonado-Rivera*, 922 F.2d 934, 962-63 (2d Cir. 1990). "A refusal to give a multiple conspiracy charge does not prejudice [a] defendant where there was ample proof before the jury for it to find beyond a reasonable doubt that [a] defendant was a member of the conspiracy charged in the indictment." *United States v. Vazquez*, 113 F.3d 383, 386 (2d Cir. 1997).

Here, the evidence at trial overwhelmingly established the existence of a single conspiracy to sell the stock of United Media Group, Inc. ("UMGI") at an artificially high price. The various actions taken by appellants were all designed to accomplish this goal. The fraudulent stock schemes were also led by the same core group of leaders; shared common participants; and were mutually interdependent. See *United States v. Berger*, 224 F.3d 107, 11415 (2d Cir. 2000) (citing these characteristics to support a finding of one conspiracy). Although appellants may have been involved in different stages of the stock scheme, "a single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation." *Id.* (quoting *Maldonado-Rivera*, 922 F.2d at 963). Accordingly, we hold that the jury had ample evidence at trial to conclude that appellants were members of a single conspiracy, and find no basis for reversal in the District Court's refusal to provide a charge of multiple conspiracies.

II. SENTENCING ISSUES

Hussey, Alexander, Richards, and Zitkevitz each contend that they were improperly sentenced by the District Court. Their principal arguments are (1) the District Court violated the teachings of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by determining the amount of loss attributable to their fraud by a standard of preponderance of the evidence; (2) the District Court erred in enhancing the sentences of Hussey and Richards for obstruction of justice; and (3) the District Court erred in denying Zitkevitz a three-point sentencing reduction for acceptance of responsibility. These contentions are without merit.

A. *Apprendi*

As we have explained, *Apprendi* does not "alter[ ] a sentencing judge's traditional authority to determine those facts relevant to selection of an appropriate sentence *within the statutory maximum*." *United States v. Garcia*, 240 F.3d 180, 183 (2d Cir. 2001) (emphasis added). Therefore, as long as a defendant is sentenced on each count within the maximum allowed by statute, a district court can determine a defendant's uncharged conduct for purposes of sentencing by using the traditional standard of proof-namely, a preponderance of the evidence. See *United States v. White*, 240 F.3d 127, 136 (2d Cir. 2001).

In the case at hand, the District Court sentenced Hussey to a term of 36 months' imprisonment, Alexander to a term of 30 months' imprisonment, Richards to a term of 87 months' imprisonment, and Zitkevitz to a term of 30 months' imprisonment. Each of these sentences is within the maximum allowed by statute for engaging in securities fraud. *See* 15 U.S.C. § 78ff (maximum of 120 months for securities

fraud). Accordingly, the District Court did not violate the teachings of *Apprendi* in determining the amount of loss resulting from appellants' offenses.

B. *Enhancement for Obstruction of Justice*

We also find no merit in the challenge of Hussey and Richards to the District Court's imposition of a two-level sentencing enhancement for obstruction of justice. The District Court found, without clear error, that Hussey had testified falsely about a material element of his offense, and that Richards had intentionally induced others to testify falsely on his behalf about a material element of his offense. Under such circumstances, a sentencing court has discretion to impose a two-level enhancement under Section 3C1.1. *See* U.S.S.G. § 3C1.1, application note 4(b) and (f) (1998) (providing for a two-level enhancement for "committing . . . perjury" or "providing materially false information to a judge."); see also *United States v. Onumonu*, 999 F.2d 43, 46-47 (2d Cir. 1993) (providing for a two-level enhancement where a defendant testifies falsely about an essential element of his offense).

C. *Reduction for Acceptance of Responsibility*

Finally, we find no error in the District Court's decision to deny Zitkevitz a threepoint reduction for acceptance of responsibility. The record supports a finding that Zitkevitz persistently refused to acknowledge his complete role in the offense and attempted to shift blame to others. Accordingly, the District Court acted well within its discretion in declining to reduce Zitkevitz's total offense level under Section 3E1.1 of the Sentencing Guidelines for acceptance of responsibility.

We have considered all of appellants' other arguments and find in them no basis for reversal. For the foregoing reasons, as well as those provided in a separate published opinion filed today, the judgments of the District Court are hereby **AFFIRMED**.

For the Court,
Roseann B. MacKechnie, Clerk

by _____